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MEMO

TO: Ravalli County Commissioners
FROM: George Corn *gc*
CC: Karen Mahar, Deputy Attorney
Karen Hughes, Planning
Lea Jordan, Environmental Health

DATE: March 24, 2008

RE: TMDL studies and reports
Appropriateness of consideration in subdivision review process

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Ravalli County Commissioners

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Dear Commissioners:

It is my understanding that the Commissioners have recently inquired regarding the extent to which they may rely in the subdivision review process on TMDL studies and report materials, including the *2005 Water Quality Sampling Final Report (Report)* generated March 17, 2006, and the subsequent training materials that have been provided to the Commissioners.

When considering the effects of a subdivision on the natural environment under RCSR 3-2-8 b.v.B., it is appropriate for the Commissioners to consider the impacts on surface water features. However, Ravalli County regulations state that the board may use water information as a basis for conditional approval or denial of a subdivision *only if* that information does not comply with regulations related to water. RCSR 3-2-8 d.i.; *Burnt Fork Burnt Fork Citizens Coalition v. Ravalli County* (1997), 287 Mont. 43, 951 P.2d 1020 (commissioners' authority to approve or deny a subdivision application must occur under regulations in effect at time of application); *accord, Brandborg v. Ravalli County*, 2003 ML 509, ¶21. More generally, applicants should not be held to the technical standards of a preliminary study that has not been officially adopted as regulation because you do not have a clear and consistent way of measuring compliance with that standard.

Thus, any TMDL water quality standards must be authorized by either local or state regulation before applicants can be held to those standards. Until such a time as regulation is adopted in this area, requiring analyses for individual subdivisions based on the TMDL preliminary studies would not be beneficial because you have no regulatory standard to enforce once you have the information.

This does not mean that the impact of a subdivision on surface water features cannot or should not be considered. You may still continue to consider recommendations from the appropriate agencies, and you may request clarification from those agencies on any specific areas of concern. Additionally, Ravalli County's groundwater vulnerability study is in process, which should provide further guidance to you in the area of impacts on natural environment. However, decisions based on consideration of TMDL preliminary studies would not be legally defensible at this time.

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As a final point of clarification, the *Report* referenced above was produced for the purpose of assisting the State with data collection in the TMDL area; this study has not yet been adopted officially as regulation at either the State or local level. The opinions expressed in the report are those of the agency collecting the data, not DEQ or Ravalli County Environmental Health. I therefore additionally advise the Board to not rely on the *Report* or any other preliminary studies or training materials to set standards at this time for impacts on surface water. To rely on such preliminary material may subject the Board's decisions to reversal by a district court upon judicial review.

The good news is that the process of reviewing TMDL standards and adopting appropriate guidelines at the State level is ongoing, with input from the Bitterroot TMDL technical advisory committee. Such guidelines, once promulgated, should give the Commissioners a clearly-articulated measuring tool to assist in deciding whether Ravalli County needs to adopt enforceable regulatory standards in this area.

I hope this helps you identify more clearly what you can and cannot consider in the area of surface water. I understand how important it is for the Commissioners to have a clear understanding of what information they can and cannot use in subdivision review and over the next few weeks I have instructed Karen Mahar to identify as many areas of uncertainty as possible (many of which have already been outlined by Planning staff) so that we may give you some specific guidance for practical use and help your final decisions withstand judicial scrutiny.

If you have any further questions or concerns about this memo of advice, please see Karen Mahar as necessary.

Sincerely,

George Corn
County Attorney

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